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Before the
Federal Communications Commission
Washington, D.C. 20554

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In re Applications of)	MM Docket No. <u>93-241</u>
DARRELL BRYAN)	File No. BPH-920109MA
SBH PROPERTIES, INC.)	File No. BPH-920123MD
)	
)	
For Construction Permit for)	
New FM Channel 276A)	
Tusculum, Tennessee)	

To: Honorable John M. Frysiak
Administrative Law Judge

REPLY TO
MASS MEDIA BUREAU'S COMMENTS ON PETITION TO ENLARGE ISSUES

SBH Properties, Inc. ("SBH") by counsel herewith submits its Reply to the "Comments on Petition to Enlarge Issues," filed by the Mass Media Bureau ("Bureau") on January 5, 1994, 1 / as follows:

1. The Bureau acknowledges that WSMG(AM) did violate the Commission's Rules in allowing its carrier to remain on, unmodulated, uncontrolled and unattended for at least a portion of each day between December, 1992 and sometime in July, 1993, subsequent to David Murray's visit to the station on SBH's

1. Pursuant to Sections 1.4 and 1.294, the filing period for submitting replies to pleadings filed in response to a petition to enlarge issues is five days, excluding holidays, plus three days for mailing (excluding holidays). In addition, counsel for SBH did not receive the Bureau's Comments until returning to the office (from conducting depositions in this proceeding) on January 13th, and is filing within two business days of receipt.

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behalf. While the Bureau characterizes this violation as being "of minor significance," it fails to explain how this can be so, given the fact that the Commission routinely takes very seriously and imposes significant forfeitures for unattended operation and for violations of the Commission's EBS monitoring requirements.

2. The Bureau is entirely incorrect in stating (at Note 2) that the station's inability to monitor for activation of the emergency broadcast system during these periods of unattended operation represents a clear violation of Sections 73.932 and 73.932 of the Commission's Rules. ²/ Thus, Sections 73.932 and 73.932 require in pertinent part that all stations: install and operate, during all hours of operation, equipment capable of receiving the EBS Attention Signal and emergency programming, so as to enable the operator on duty "to be alerted instantaneously upon the receipt of the attention signal and to immediately monitor emergency programming," as well as to take certain actions "immediately" upon receipt of Emergency Action Notification including: monitoring radio networks for further instructions, checking with wire services, verifying the authenticity of the message with the current EBS Authenticator List, monitoring its monitoring assignment, discontinuing normal

2. Likewise, the Bureau's comment that Bryan believed he was in compliance because "the carrier current was on for maintenance purposes" is ludicrous. Byran readily acknowledged that he was not in fact conducting any maintenance, whatsoever, and that he left the carrier in violation of Commission Rules solely to avoid the costs of having to conduct maintenance, i.e., having to spend the funds necessary to repair the transmitter.

programing and following the appropriate transmission procedures, i.e., participating stations relay emergency programing, and "non-participating stations are required to remove their carriers from the air and monitor for the Emergency Action Termination." Therefore, WSMG was in clear violation of these Rules, inasmuch as it was not in a position to either relay emergency programming or to remove its carrier from the air or otherwise follow required procedures in the event of an EBS activation. (See: Petition to Enlarge/Threshold Showing at para. 11).

3. The Bureau's contention that Bryan has adequately explained that the transmitter readings set forth in the logs was incorrect is erroneous and its statement that it has no reason to dispute Bryan's claim that the station at no time operated at excess power simply reflects its failure to consider the evidence. Thus, as reflected in SBH's Reply to Opposition to Petition to Enlarge and the accompanying Declaration of David Murray, while Bryan's engineer's methodology is sound, his conclusions are not, inasmuch as they are based upon an undemonstrated and, accordingly, potentially false premise. In that regard, as Murray demonstrates, Bryan has offered no evidence demonstrating that 70% is the proper efficiency factor to be applied in this instance, consistent with the requirements of Section 73.51 of the Commission's Rules. Therefore, the Bureau's contentions to the contrary notwithstanding, there remains a material question of fact regarding whether WSMG has operated in excess of its authorized power.

4. Furthermore, the Bureau does not even address the fact that, even if WSMG did not in fact operate with excess power, Bryan has admitted permitting the station's transmitter to be operated by remote control for over one year, without the benefit of accurately calibrated remote monitoring meters in violation of Sections 73.51, 73.1410 and 73.1860 of the Rules and did so, again, simply to save money.

5. While the Bureau states that it does not consider the conduct in question disqualifying, that is a matter more properly addressed once issues have been added, discovery completed and evidence adduced. The Bureau's Comments fail to acknowledge or address the fundamental question: whether SBH has advanced a prima facie showing that Bryan, through his operation of WSMG, has engaged in numerous and repeated violations of the Commission's Rules. Indeed, given the fact that the Bureau's Comments neither address the alleged nontechnical violations nor the significance of the totality of those violations, as bearing on the appropriateness of permitting the adduction of evidence regarding Bryan's past broadcast record, the Bureau's opinion that the conduct would not be disqualifying is based upon an incomplete assessment of the case advanced in SBH's Petition, as supplemented. ³/

3. The Bureau limited its Comments to the violations of the technical Rules. This was appropriate in light of the ALJ's request for Comments, as well as the Bureau's lack of any peculiar expertise on nontechnical matters.

6. As such the Bureau's Comments reflect a proclivity to downplay the significance in the comparative context of violations of the Rules by applicants in their prior operation of broadcast stations, violations which the Commission's Field Operations Bureau takes very seriously, as evidenced by the forfeitures which are routinely impose for such violations. As indicated in SBH's Reply to Opposition to Supplement to Petition to Enlarge, filed January 10, 1994, the Court of Appeals has previously cautioned the Commission against failing to give adequate consideration to evidence of past broadcast related conduct when proffered. Monroe Communications Corp. v. FCC, 900 F.2d 351, 353 (D.C. Cir. 1990); Central Florida Enterprises, Inc. v. FCC, 638 F.2d 503, 510 (D.C. Cir. 1990) While the Court was addressing the Commission's grant of renewal expectancies in the face prior rule violations, which the Commission had deemed "minor," the concerns enunciated by the Court are all the more applicable here, where Bryan seeks not simply the renewal of an existing license, but the award of yet another authorization by the Commission.

Respectfully Submitted,

SBH PROPERTIES, INC.

By: 

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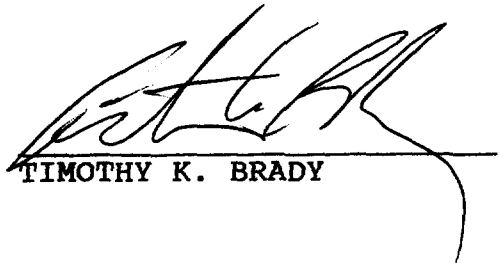
CERTIFICATE OF SERVICE

I, Timothy K. Brady, hereby certify that I have this 18th day of January, 1994, served a copy of the foregoing Reply to the Mass Media Bureau's Comments on Petition to Enlarge Issues by First Class mail, postage prepaid upon the following:

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